In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 547

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FOOTE BROTHERS GEAR & MACHINE CORPORATION

No. 548

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INDEPENDENT UNION OF GEAR WORKERS

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO REVERSE

SUPPLEMENTAL MEMORANDUM IN BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

The briefs filed by the Employer (Br. 8) and by the Independent (Br. 14), in opposition to our petition for writs of certiorari in the above-entitled cases, each make the contention that the Board stipulated with them that the Circuit Court of Ap-

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peals might consider, as part of the record, the Employer's narrative statement of the testimony. This contention, of course, goes to the heart of our argument as to the propriety of using the narrative.[1] This memorandum, therefore, is filed in order to inform the Court fully as to the circumstances bearing upon the meaning of the stipulation.

It is, and throughout these cases has been, the Board's understanding that the stipulation (R. 1051), and the order entered thereon (R. 1052), had as their sole purpose and objective the consolidation for hearing, upon one and the same record, of the case just arising upon the Independent's petition to review (in which the stipulation and order were made) with the case theretofore pending upon the Employer's petition to review. The stipulation, directed at consolidation of the records, cannot under the circumstances be thought to have settled the quite different question of what should constitute the record.

The Employer, on November 27, 1939, had moved the Circuit Court of Appeals (R. 1022–1023) in its case to require the Board to certify and file, *as part of the record before the Board,* the Employer's narrative of the testimony. The Board, in opposing (R. 1025–1026), had pointed out that the narrative was *not* part of the record before the Board

[1] The Board's second reason for granting the writs, i. e., that the Circuit Court of Appeals transcended the permissible bounds of review as to the facts, is not affected by this contention.

and hence could not be so certified under Section 10 (f) of the Act (see Bd. Pet. at p. 9). On December 7, 1940, the court had *denied* the Employer's motion (R. 1018). Thereafter, on December 15, 1939, the Employer further moved in its case (R. 1027–1029) for leave to print its narrative as part of the record, not before the Board, but before the Circuit Court of Appeals. Counsel for the Employer bottomed its motion exclusively upon the ground that the use of its narrative would save printing costs (R. 1028–1029). On January 18, 1940, despite the Board's objections (R. 1030–1032), the Circuit Court of Appeals granted the Employer's motion (R. 1019).

The only cause pending upon review, up to this point in the proceedings, was Case No. 7088 arising upon the petition of the Employer. And the Board had consistently and repeatedly advanced serious objections to the consideration of that case upon the Employer's narrative of the testimony. The next step was taken by the Independent, on March 9, 1940, when it filed its separate petition to review the Board's order, which was docketed, separately, as Case No. 7252.[2] On that same date, March 9, 1940, counsel for the Independent forwarded to the Board a copy of the petition for review together with a form of stipulation bearing only the title of the Independent's case, No. 7252 (see R. 1051). In his covering letter, set forth

[2] This petition appears in the Transcript of Record in No. 7252, pp. 1–12.

in the margin,[3] counsel for the Independent stated that the purpose of the stipulation was to have "the record in Foote Bros., case No. 7088, stand as the record in this case and to consolidate the cases for the oral argument." There were obvious, and proper, bases for such a stipulation.[4] The

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[3] The entire body of the letter, which is not of record but to which the Board believes it proper under the circumstances to refer, reads as follows:

"MARCH 9, 1940.

"In re: *Independent Union of Gear Workers* v. *National Labor Relations Board and Foote Bros. Gear and Machine Corporation, No. 7252*

"Honorable CHARLES FAHY,

"*General Counsel, National Labor Relations Board,*

"*Washington, D. C.*

"DEAR MR. FAHY: In order to save expense and to facilitate the matter, I enclose herewith a copy of the petition just filed, together with a stipulation, with a copy for your file, a copy for my file, and a copy for Foote Bros.' file, for the purpose of having the record in Foote Bros., case No. 7088, stand as the record in this case and to consolidated the cases for the oral argument.

"If this is not in a form which you wish please feel free to revise it.

"This is my second and last appeal to the Circuit Court of Appeals, I hope. I don't want you to get the impression that I am opposed to the general spirit and philosophy of the Act or what you in general are trying to do.

"Sincerely yours,

"BW:GE "[s] BENJAMIN WHAM.

"Enc."

[4] In the absence of such a stipulation, Section 10 (f) of the Act would have required the certification and filing, in Case No. 7252, of the identical record before the Board certified and filed, months before, in Case No. 7088; the two causes, moreover, would have proceeded to final hearing independently.

Board, accordingly, executed and returned the stipulation to counsel for the Independent promptly under date of March 11, 1940.

Thereafter, on March 19, 1940, the Board received from the Circuit Court of Appeals, in Case No. 7088 (pending on the Employer's petition for review), a document entitled "Transcript of Record" containing the Employer's narrative of the testimony (see Bd. Pet. at pp. 9–10). On April 25, 1940, the Board filed in Case No. 7088 its motion to strike the narrative and exclude it from consideration as any part of the record upon review and its motion that, as one of three alternative ways of making up an appropriate printed record, the Board be authorized to print, at its expense, the entire record before the Board certified to the court (R. 1036–1045; see Bd. Pet. at pp. 9–10). In its motion to strike, the Board renewed and amplified its "strenuous" (R. 1039) objections to considering the case upon a document not part of the record before the Board, and asserted that the Board had *never* agreed to such use of the narrative (R. 1037, 1039). The court denied both motions, on May 23, 1940, with leave to renew the motion to strike at final hearing (R. 1048–1049). The motion to strike was renewed in Case No. 7088 at final hearing and denied by an order entered in that case on July 24, 1940 (R. 1049). On the same date, the Court handed down its opinion (R. 1052–1073) and entered separate decrees (R. 1073, 1074) upon the merits.

The words of the stipulation upon which respondents rely are that "The record as certified * * * [in Case No. 7088] and the summary thereof shall stand as the record of the proceedings before said Board in this case" (R. 1051). These words, if given the construction here urged by the Independent (Br. 14) and by the Employer (Br. 8), would result in overturning the order of the Circuit Court of Appeals, entered on December 7, 1939 (R. 1018), sustaining the position of the Board that the narrative was *not* part of the record before the Board (pp. 2–3, *supra*). This is a most unlikely intention to impute to the parties. Normally, and under the circumstances here, the purpose and objective of such a stipulation would be solely to consolidate the cases and thus relieve all parties of the inconvenience and expense involved in making up a separate printed record (pp. 2, 4, n. 4, *supra*). The action of the Circuit Court of Appeals on May 23, 1940 (R. 1048–1049), also militates against the respondents' position. Despite the Employer's contention that the Board stipulated to the use of the narrative (R. 1046–1047), and despite the fact that it had entered an order upon the stipulation (R. 1052), the Circuit Court of Appeals granted the Board leave to renew, at final hearing, its motion to strike the narrative and thus indicated that it had construed the stipulation otherwise than in accordance with the claims of the Employer and the Independent.

The critical words, that the "record as certified * * * [in Case No. 7088] and the summary thereof shall stand as the record of the proceedings before said Board in this case" (R. 1051), should be construed to have no other meaning than that, having been handed physically to the Board at oral argument before it (R. 995), the summary was among the papers before the Board; not that the summary was by stipulation made a part of the record of the proceedings upon which the order of the Board was entered and on which the Circuit Court of Appeals is required, under Section 10 (e) and (f), to decide the case on the merits.[8] The question of the right to have the summary used as part of the record for decision on the merits was being contested in Case No. 7088 and was still open for final determination by the Circuit Court of Appeals.

The stipulation in its entirely means only that the case arising upon the petition of the Independent, No. 7252, should be reviewed upon the same record as that upon which review would be had in the already pending Employer's case, No. 7088. All the motions and objections with respect

[8] The Board frequently has occasion, primarily for the purpose of showing that a certain contention was or was not made, to file with a reviewing court a copy of a brief submitted to the Board or a transcript of oral argument before it. In such cases, the document is certified as a true copy (cf. R. 1009), or even as a physical part of proceedings before the Board (cf. R. 971), but it is not certified as a part of the transcript of record upon which the order of the Board was entered (cf. R. 967).

to the narrative, both before and after the stipulation, were directed toward the Employer's case, No. 7088; thus the Independent's case was viewed as merely ancillary, as in fact it was, to the main proceeding in which the rights of all the parties were being litigated. It may be noted, too, that the Board could not stipulate or certify the narrative as part of the record upon which the order of the Board was made because, in fact, it was not and Section 10 (e) and (f) governs the record that may be certified. The second paragraph of the stipulation, referring to "the printed record to be filed in said cause, No. 7088," is indicative of the subordinate character of the case in which the stipulation was made and shows that, rather than settling the rights of the parties in the main proceeding, the stipulation was dependent upon the determination in the Employer's case as to what should constitute an appropriate record for decision on the merits.

The suggestion that the stipulation was intended to waive the Board's objections to the narrative assumes that the parties sought to accomplish this important result by the obscure device of a stipulation purporting to apply only to Case No. 7252 (see R. 1051). It is scarcely credible that the parties, had they intended a complete settlement of the narrative controversy, would have left its effect upon Case No. 7088 solely to implications arising from the consolidation clause at the end of the document (see R. 1051).

The Employer (Br. 8) also advances an estoppel argument. There is no claim here that any item of expense was incurred in reliance upon the stipulation.[6] But the Employer urges that, in reliance upon the Board's failure to move to vacate the court's order of January 18 making the narrative part of the record upon review (p. 3, *supra*), it expended over $2,000 for printing. The order of January 18 was entered upon the insistence of the Employer (R. 1027–1029) over the strenuous objections of the Board (R. 1030–1032). The Board had fully presented its position, at that time, but had been overruled by the order of January 18. The Board, plainly, was under no further obligation to move at once to vacate. Rather, the Employer took the risk of proceeding in accordance with an order which it had obtained over objections and which it knew the Board would probably seek to have overruled or reversed as erroneous.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
National Labor Relations Board.

DECEMBER 1940.

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[6] The printed record bears the Clerk's stamp as having been filed on March 15, 1940, the very day the stipulation was filed, one day before the order thereon, and only two or three days after counsel for the Independent had received the stipulation executed by the Board.

APPENDIX

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 7252

INDEPENDENT UNION OF GEAR WORKERS, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND FOOTE BROS. GEAR AND MACHINE CORPORATION, A CORPORATION, RESPONDENT

STIPULATION

It is hereby stipulated and agreed between the parties hereto by their respective attorneys of record that:

1. The record as certified to this Court by the National Labor Relations Board in the case of Foote Bros. Gear and Machine Corporation, a corporation, petitioner, vs. National Labor Relations Board, respondent, No. 7088, and the summary thereof shall stand as the record of the proceedings before said Board in this case.

2. The printed record to be filed in said cause, No. 7088, shall stand as the printed record in this cause, and an order may be entered in this cause providing that the Clerk of this Court take no action under Rule 14 of this Court in re Printing of the record herein.

It is further stipulated and agreed that said causes, Nos. 7088 and 7252, may be consolidated for purpose of argument.

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Corporation, a corporation.

U. S. GOVERNMENT PRINTING OFFICE: 1940